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April 30, 2008

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Date of Filing: July 27, 2007

Case Number: TSO-0521

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (the individual) to hold an access authorization (also called a security clearance) under the provisions of 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual's access authorization should be restored. For the reasons discussed below, I have determined that the individual's access authorization should not be restored at this time.

I. Background

The individual has held a Department of Energy (DOE) access authorization for over 20 years. During a routine reinvestigation for continued access authorization in December 2005, the individual revealed to the investigator that he had not filed his federal income tax returns for several years. The local DOE Security office (LSO) conducted a personnel security interview (PSI) with the individual in June 2006, at which the individual explained that he had in fact filed his federal returns after the reinvestigation but claimed that he had earned no income and therefore owed no taxes. He also admitted that the Internal Revenue Service (IRS) had informed him by letter that his claim was frivolous, yet he continued to file his taxes in a similar fashion. In addition, the individual stated that he had not filed his state tax returns for the preceding three years. Finally, the individual explained his belief that his employment at the DOE facility generates no taxable income; instead, he exchanges his time and labor for money. The LSO determined that the individual's failure to observe income tax laws constituted derogatory information that created a substantial doubt about his eligibility for an access authorization. Because the security concerns remained unresolved after the PSI, the LSO sought and obtained authority to initiate an administrative review proceeding.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that his access authorization had been suspended on the basis of information that created a substantial doubt concerning his eligibility for access authorization. The Notification Letter included a recitation

of the derogatory information described above and explained how that information fell within the purview of one potentially disqualifying criterion, Criterion L, which is set forth at 10 C.F.R. § 710.8(l).¹ The letter further informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the LSO forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Acting Director of OHA appointed me as the Hearing Officer in this matter.

At the hearing convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual and an LSO personnel security specialist. The DOE submitted 39 exhibits before the hearing, and the individual submitted 10 exhibits before and during the hearing and five letters of recommendation after the hearing. A transcript of the hearing was produced and will be hereinafter cited as "Tr."

II. Regulatory Standard

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. The Hearing Officer's role in this proceeding is to evaluate the evidence concerning the individual's eligibility for access authorization presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of national security." 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the individual's age and maturity at the time of the conduct; the voluntariness of the individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and evidence presented by both sides in this case.

III. The Notification Letter and the Security Concern at Issue

In its Notification Letter, the LSO cites one criterion, Criterion L, as the basis for suspending the individual's access authorization. The derogatory information that raised the LSO's concerns under this criterion relates to the individual's unusual conduct based on his interpretation of the

¹ Criterion L relates, in relevant part, to information that a person has "engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or undue duress which may cause the individual to act contrary to the best interests of national security . . ." 10 C.F.R. § 710.8(l).

federal tax laws. The LSO contends that the following information falls within the scope of Criterion L: (1) the individual admitted that he did not file federal income tax returns from 2000 to approximately 2003; (2) he then resumed filing tax returns, including overdue returns, but indicated on them that he had no income subject to taxes; (3) even after the IRS advised him in June 2005 that his 2002 return was frivolous, he continued to file federal income tax returns in the same manner; (4) he admitted that he has not filed state income tax returns for 2003, 2004, or 2005; and (5) he indicated to the LSO that he believes his earnings are not subject to income tax because he exchanges his time for money.

I find that the information set forth above constitutes derogatory information that raises questions about the individual's honesty, reliability, and trustworthiness. Criterion L concerns that arise from failing to file income tax returns or from fraudulently filing tax returns call into question an individual's self-control, judgment, or willingness to abide by rules and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) at Guideline F; *Personnel Security Hearing, Case No. TSO-0531*, 30 DOE ¶ 82,763 (February 20, 2008); *Personnel Security Hearing, Case No. VSO-0573*, 28 DOE ¶ 82,921 (June 19, 2003). *See also* Tr. at 32-33 (testimony of personnel security specialist).²

IV. Findings of Fact

The facts in this case are not in dispute. The individual did not file his income tax returns for the years 2002 through 2005 on a timely basis.

In March 2005, the individual filed his federal income tax returns for 2002, 2003, and 2004. Exhibits 25 and 28. On each of those returns, he entered "0" in the Income and Adjusted Gross Income sections. He attached to each return a letter that set forth his position that he had received no income in each of those years. Exhibits 25, 27, 28. On June 21, 2005, the IRS wrote a letter to the individual, in which it advised him that it had determined that the information he had provided on his return was frivolous and had no basis in law, and further advised him of the consequences of maintaining his position. Exhibit 23. Despite this notification from the IRS, he completed his federal income tax return for 2005 in the same manner. Exhibit 24.

The individual has not filed any state income tax returns since 2001. Exhibit 37 (Transcript of Personnel Security Interview) at 15; Tr. at 100.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. After due deliberation, I

² At the hearing, the personnel security specialist also contended that the individual's conduct could render him susceptible to coercion, duress, exploitation or pressure, because the IRS might pursue a remedy against him that would place his finances at risk. Tr. at 56-57. I find this concern to be speculative at best. There is no evidence in the record that the individual's resources would be in jeopardy even if this unlikely event were to occur. I will, therefore, restrict my analysis to the security concern described above.

have determined that the individual's access authorization should be not restored at this time. I cannot find that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

A. Mitigating and Explanatory Evidence

Throughout this proceeding, the individual has carefully explained his interpretation of the federal tax laws. In essence, he contends that the Internal Revenue Code contains no definition of "income." Tr. at 24-26, 78; *see* Exhibit 37 at 29. He testified that he has sought clarification of the definition of "income" from his elected representatives and the IRS, but has received "no responses *that I can rely on* for a true, factual answer to any of my questions." Tr. at 24-25 (emphasis added). He reported that he consulted a tax attorney on this matter, but deemed the attorney's response to be a conflict of interest and therefore not reliable. Exhibit 37 at 18. Because no one has convinced him to the contrary, he claims that the wages he receives from his employer do not constitute income and therefore cannot be subject to income tax. Tr. at 89-90. He remains steadfast in his interpretation of the federal income tax laws, even though he acknowledges that it is not commonly held, and that the IRS has advised him that it is frivolous. *Id.* at 68-69; Ex. 23. All of his conduct with respect to federal and state income tax returns strictly comports with his unusual interpretation of the federal tax laws.

The record indicates that the individual has now filed his federal income tax returns through 2006. The individual testified that he filed those returns not because the law requires that action, Tr. at 100, but because he wanted to claim refunds of the amounts his employers had withheld from his paychecks during those years.³ *Id.* at 99. The money withheld apparently covers any tax liability the IRS has determined he owes.⁴ *Id.* at 59-60. Nevertheless, the individual continues to file returns in which he states that he had no income, even though the IRS has informed him that such filings are frivolous.

In addition, the individual has not filed his state income tax returns for several years. During the PSI, the individual declared that the state has no authority to levy taxes; only the United States Congress does. Exhibit 37 at 16, 46. At the hearing, however, he offered an additional justification for not filing state returns: "[I]f I don't earn federal income, [and the] state has tied themselves to that, [] I don't earn state income and therefore there is no need to file." Tr. at 100. Although he has filed federal returns to claim refunds of federal withholdings from his paycheck,

³ I note a discrepancy in the individual's recollection of the events. The individual testified that another reason he filed his overdue returns was that the investigator who conducted his reinvestigation advised him that "there would probably be some follow-up" if he did not. *Id.* at 99. The record clearly establishes that the reinvestigation was conducted in December 2005. Exhibit 5 (Case Evaluation Sheet, January 26, 2006) at 2. Therefore, the individual filed his federal income tax returns for 2002, 2003, and 2004 nine months before he met with the investigator. I find this discrepancy to be immaterial because neither reason demonstrates that the individual has altered his unusual beliefs regarding his tax liability, and it is clear to me that he will continue to comport his behavior to those beliefs.

⁴ Although the individual informed his employers that he was exempt from withholding, his employers withheld, and continue to withhold, the maximum amount permitted. *Id.* at 62. According to the individual, the IRS has directed them to take that action. *Id.*

he has not filed state returns to claim refunds of state withholdings, because the state is poor and needs “all the money [it] can get.” *Id.* at 101.

The individual has stated that if the law requires him to pay income taxes, he will pay them. *Id.* at 83, 102. On its face, this statement demonstrates a willingness to comply with lawful obligations. I find this statement to be disingenuous, however. The individual refuses to accept any positions contrary to his own on this matter, regardless of the authority, whether elected officials, tax lawyers, or the IRS itself. *See, e.g.*, Exhibits 23, 39. He relies on his selection of federal court decisions that he believes support his interpretation of the United States Constitution and various tax laws, *see, e.g.*, Exhibits E, F, G, but dismisses as unreliable those rulings that undermine his interpretation.

The individual has also stated that differences between the income tax laws and the laws that govern the safeguarding of classified information and special nuclear material dictate that he will not treat the two sets of laws the same. He contends that the tax laws are vague and subject to multiple interpretations, Exhibit 37 at 21, but the laws safeguarding classified information are not. He testified that he follows the latter laws carefully, and has not been charged with any form of security offense in the more than 20 years he has held his security clearance. Tr. at 24, 60, 112, 117. He further testified that if he were to have any doubt about how to handle classified information in a particular situation, he would contact the appropriate personnel immediately and defer to their instructions. *Id.* at 80, 84. In fact, this situation has not arisen. *Id.* at 117. His stated conviction that he would behave appropriately if faced with such a situation is hypothetical and, given his behavior toward the income tax laws, I have significant doubts that he might interpret the laws safeguarding classified information for his own purposes.

Finally, the individual submitted five letters of recommendation into the record after the hearing. The letters were written by his current first-line manager, two former supervisors, and two co-workers, and covered the period from 2001 through the present. The letters consistently asserted the individual’s positive qualities: good workmanship, reliability, trustworthiness, and demonstrated care in handling classified material. Although a few of the authors mentioned their awareness of the LSO’s concern about the individual’s tax matters, none offered any insight into his behavior regarding income taxes. While I accept the authors’ opinions that the individual is in general an upstanding citizen and an excellent worker, this evidence does not outweigh the uncontroverted derogatory information in the record concerning his conduct regarding the income tax laws.

B. Hearing Officer Evaluation of the Evidence

In previous decisions involving individuals who failed to file and pay taxes, OHA Hearing Officers have generally looked at the reasons for the failure to file and the actions the individuals have taken to make amends for past delinquencies. *Personnel Security Hearing, Case No. VSO-0573*, 28 DOE ¶ 82,921 (June 19, 2003) (and cases cited therein). While the individual’s specific challenge to the application of the tax laws may be unusual, it falls within the ambit of tax protester arguments that wages do not constitute taxable income. Those arguments, to the extent that they are comprehensible, have been consistently rejected by the courts. *See, e.g., Stubbs v. Commissioner of IRS*, 797 F.2d 936, 938 (11th Cir. 1986) (rejecting argument that wages are not

taxable income as “patently frivolous”); *Ficalora v. Commissioner of IRS*, 751 F.2d 85, 87-88 (2nd Cir. 1984) (holding that income includes compensation for services); *Lonsdale v. Commissioner of IRS*, 661 F.2d 71, 72 (5th Cir. 1981) (rejecting “even exchange” argument). *See also* Exhibit 39 (IRS publication “The Truth about Frivolous Tax Arguments,” November 30, 2006). Because the individual firmly maintains his unusual interpretation of federal tax laws in the face of definitive legal authority to the contrary, and comports his behavior to that interpretation, I must doubt his commitment to obey the laws that safeguard classified information and special nuclear material.

The individual is resolute in his belief that the wages he earns are not subject to income tax. The fact that the great majority of citizens pay federal and state income taxes on their wages does not sway him from that interpretation. The opinions of tax lawyers do not sway him. Responses from elected officials and authoritative rulings from the IRS do not sway him. It is clear to me that he has chosen to interpret an extremely complex set of laws in a manner that suits him, despite any evidence to the contrary, and has acted in accordance with his chosen interpretation. I find that the individual’s stubbornness on this matter reflects such poor judgment that it casts considerable doubt on his reliability.

My responsibility in this proceeding is to assess the risk that the individual will not properly safeguard classified information and special nuclear material, and restore the individual’s access authorization only if that risk is low enough that it does not raise a concern for the national security. In reaching that determination, I am guided by the regulations that govern this proceeding, which require that I consider such factors as the nature of the conduct, the individual’s knowledgeable and voluntary participation, and the likelihood that the conduct will continue, among other circumstances. 10 C.F.R. § 710.7(c). The individual has interpreted the tax laws in an unconventional manner and is unwilling to accept guidance from experts that does not comport with the position he has taken. Consequently, I am not convinced that he will not likewise form his own unusual interpretation of the laws, regulations, and rules that govern the safeguarding of classified information and special nuclear material, and act in accordance with that interpretation. None of the arguments the individual has presented convinces me that he can be trusted to comply with security regulations. Based on the record before me, I find that the individual has not mitigated the LSO’s security concerns under Criterion L regarding his reliability and trustworthiness.

VI. Conclusion

As explained in this Decision, I find that the local DOE security office properly invoked 10 C.F.R. § 710.8(l) in suspending the individual’s access authorization. For the reasons described above, I find that the individual has not sufficiently mitigated those security concerns. I therefore cannot find that restoring the individual’s access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I have determined that the individual’s access authorization should not be restored

at this time. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: April 30, 2008